COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO. 57347-99**

Marcelle Tull	Employee
Carney Hospital	Employer
Archdiocese of Boston/SIG c/o Managed Comp.	Self-insurer

REVIEWING BOARD DECISION
(Judges Maze-Rothstein, Carroll and McCarthy)

APPEARANCES
William T. Salisbury, Esq., for the employee at hearing
Mary B. Klegman, Esq., for the employee on appeal
Robert J. Riccio, Esq., for the self-insurer at hearing
Peter P. Harney, Esq., for the self-insurer on appeal

MAZE-ROTHSTEIN, J. Relying on the foundational grounds set out in Patterson v. Liberty Mut. Ins. Co., 48 Mass. App. Ct. 586 (2000), the self-insurer appeals from a decision that awarded the employee workers' compensation benefits for a back injury brought on by sneezing at work on February 3, 1999. (Dec. 678) We conclude that the employee's sneezing was incident to the conditions in her employment, and that she neither had to prove the exact causative substance that provoked the sneezing, nor that the work environment was "a major cause" of her sneezing or her back injury, under G. L. c. 152, § 1(7A), as the two did not, and could not, combine "to cause or prolong" the injury or need for treatment. Id. We, thus, affirm the decision.

Marcelle Tull was a registered nurse in the United Kingdom from 1971 to 1978, when she emigrated to the United States. She worked as a nurse's assistant for the employer starting in 1981. Because she had a corneal transplant, and could not see very well after that procedure, she gave up both nursing and driving. In 1984, she became a unit secretary. Her duties included coordinating doctors' orders, directing calls for patients and staff, running errands, ordering supplies, and stocking the supply room. She also admitted and discharged patients, transcribed doctors' orders, and handled referrals, consults, and the mail. (Dec. 677-678.)

The employee's work area in the months leading up to her injury was dusty. The vice-president of patient care, Carol Krzywda, corroborated that the employee complained of dust in her work area. (Dec. 678.) Ms. Krzywda had the maintenance crew check the ventilation ducts. (Dec. 678; January 3, 2002 Tr. 47-48, 64.) On February 3, 1999, the employee had been sneezing throughout her work shift due to the dust. When she sneezed, yet again, in the supply room, she felt a severe pain in her back. She reported the incident, and missed several days from work, returning on February 8, 1999. (Dec. 678, 682.)

However, the employee's back pain continued, and she left work for good on March 11, 1999. Her physician diagnosed her as having a herniated disc, and surgery was performed on September 14, 1999. Post operatively, her pain, though improved, continued.

The employee filed a claim for § 34 temporary total weekly compensation. Those benefits were awarded after a § 10A conference. Both parties appealed for a hearing de novo. (Dec. 677). On June 18, 2001, a § 11A doctor examined Ms. Tull. He offered a diagnosis of status post excision herniated disc L5/S1 and decompressive right foraminotomy L5/S1, possible mild arachnoiditis, and low grade trochanteris bursitis right hip. The doctor causally related the employee's conditions to her sneezing at work, and found the employee to suffer from a permanent partial impairment with restrictions on bending, pushing, pulling, twisting or lifting of more than 10-15 pounds, and no prolonged standing, sitting or walking. (Dec. 679-680.) Pursuant to § 11A(2), the judge allowed the parties to submit additional medical evidence due to the inadequacy of the doctor's report on the issue of extent of medical disability. (Dec. 677.)

The judge allowed the employee to join a claim for § 34A permanent and total incapacity benefits to her claim for temporary total incapacity benefits. (Dec. 677.) Based on the testimony of the employee and her supervisor, and the medical opinions of the § 11A physician indicating severe restrictions, the judge awarded the employee § 34A permanent and total incapacity benefits for her February 3, 1999 back injury. (Dec. 682.)

The self-insurer on appeal contends that the employee did not prove that her back injury arose out of her employment, pursuant to G. L. c. 152, § 26.[1] In support of its contention, the self-insurer looks to Patterson, supra, and argues that the employee's claim must fail due to the lack of evidence on the specific irritant that caused her to sneeze at the workplace. Id. at 589. The self-insurer theorizes that, absent proof of the exact substance that caused the employee to sneeze, the employee could not show that the subject sneeze – and therefore her back injury – arose out of the employment. We do not agree.

Patterson addressed a respiratory exposure injury allegedly caused by toxins at the workplace, the identity of which the employee failed to prove. Under such circumstances, the court held that the expert medical opinion on causal relationship between the unknown workplace agents and the respiratory injury cannot be found to rise above mere conjecture. Id. at 592. Here, the self-insurer's argument based on Patterson fundamentally fails, because the employee's claim does not assert that the respiratory component of her workplace injury was due to a noxious exposure to unknown substances. The employee injured her back while sneezing. The judge credited the employee's testimony that her work area was dusty to the point that she would periodically have to clean dust off the glasses she wore. He also, credited that the dusty work conditions caused her to repeatedly sneeze, which jarring action became the mechanism of injury and hurt her back. (Dec. 682.) To the extent that it is even a "scientific" or "medical" issue, the fact that breathing dust can cause a person to sneeze is not a subject requiring expert testimony. Lovely's Case, 336 Mass. 512, 515 (1957)(cause of injury so obvious as to be within common knowledge and everyday experience of general population does not require expert medical testimony). The judge

1 General Laws c. 152, § 26, reads, in pertinent part:

> "If an employee . . . receives a personal injury arising out of and in the course of his employment. . ., he shall be paid compensation. . . ."

adopted the § 11A physician's testimony, along with the expert testimony of the employee's treating physicians, that the bodily movement involved in sneezing, caused her disc herniation and resultant medical disability. (Dec. 682.) We agree with the employee that her credible account of dust in the workplace – even a normal amount, see Flaminio v. Central Motors, Inc., 17 Mass. Workers' Comp. Rep. 45, 47 (2003) – suffices to satisfy the § 26 requirement of "arising out of." See Caswell's Case, 305 Mass. 500, 502 (1940)(injury must merely be attributable to the "nature, conditions, obligations or incidents of the employment"). Patterson, is therefore inapposite.

The self-insurer also argues that the employee's claim must also fail, because she did not meet the heightened causal standard under § 1(7A), "a major" cause. That provision reads as follows:

> If a compensable injury or disease combines with a pre-existing condition, which resulted from an injury or disease not compensable under this chapter, to cause or prolong disability or a need for treatment, the resultant condition shall be compensable only to the extent such compensable injury or disease remains a major but not necessarily predominant cause of disability or need for treatment.

G. L. c. 152, § 1(7A).[2] While we agree with the self-insurer that the judge should have addressed § 1(7A) in his hearing decision, that error is harmless, as the section did not apply to the employee's claim, in any event. The self-insurer's assertion again mistakes the nature of the employee's injury: it points to the employee's pre-existing conditions of allergies and rhinitis. This much is undisputed, but the fact of a pre-existing condition does not make this a 'combination' case. We decline to apply the § 1(7A) combination language in such a way as to include seriatim combinations such as the present one argued by the self-insurer. Even granting the employee's sensitivity to dust due to allergies, nothing indicates a medical combination under § 1(7A) between pre-existing allergies and the compensable back injury, "to cause or prolong disability or a need for treatment." G. L. c. 152, § 1(7A). See Resendes v. Meredith Home Fashions, 17 Mass. Workers' Comp. Rep. ___ (October 1, 2003). In other words, while at most the

[2] We note that the self-insurer did raise the issue of § 1(7A)'s application in its issues sheet, Exhibit 2. See Jobst v. Leonard T. Grybko, 16 Mass. Workers' Comp. Rep. 125, 130 (2002).

employee's pre-existing allergies might have combined with the dust to cause the sneezing, that is where the § 1(7A) "combination" stops. The possible contribution of the pre-existing allergies to the sneeze says nothing about the back injury that the sneeze then caused. The only colorable way to implicate § 1(7A) in a factual scenario such as this would be if the claimed injury included a dust related medical worsening of the employee's allergic condition to the point of disability. See Lagos v. Mary A. Jennings, Inc., 11 Mass. Workers' Comp. Rep. 109 (1997)(question of whether there was an unrelated preexisting mental condition that was worsened by a physical work injury). There is no such allegation here. Section 1(7A) simply does not apply to the employee's back injury. The judge's failure to address the issue is therefore harmless.

The self-insurer also alludes to the employee's history of having had an episode or two of back pain prior to the subject industrial injury as additional, or alternative, grounds for § 1(7A)'s application. While the self-insurer is at least addressing the correct injury constellation in so arguing – i.e., pre-existing back pain as it relates to a "compensable" back injury under § 1(7A) – merely referencing a minor occurrence or two does not mean that the self-insurer has shown the "pre-existing condition which resulted from an injury or disease not compensable under this chapter" required to trigger the application of § 1(7A). The self-insurer's reference to the employee's prior back pain falls short of the production of evidence necessary to invoke the provisions of § 1(7A). See Fairfield v. Communities United, 14 Mass. Workers' Comp. Rep. 79, 83 (2000). Moreover, we note, in any event, that the § 11A physician opined that the workplace sneezing was "a major cause" of the employee's back injury. (Dep. 23.)

As to the self-insurer's other arguments on appeal, we summarily affirm the decision.

The self-insurer shall pay counsel for the employee a fee of $ 1276.27 under the provisions of G. L. c. 152, § 13A(6).

So ordered.

Susan Maze-Rothstein
Administrative Law Judge

William A. McCarthy
Administrative Law Judge

Filed: May 26, 2004

Martine Carroll
Administrative Law Judge

SMR/lk